

SOME ISSUES OF DETERMINING CRIME FOR OBTAINING PROPERTY BY FRAUD IN HO CHI MINH CITY ACCORDING TO CRIMINAL CODE 2015 (AMENDED AND SUPPLEMENTED IN 2017) OF VIETNAM

ALGUMAS QUESTÕES DE DETERMINAÇÃO DO CRIME DE OBTENÇÃO DE PROPRIEDADE POR FRAUDE NA CIDADE DE HO CHI MINH DE ACORDO COM O CÓDIGO PENAL DE 2015 (ALTERADO E COMPLEMENTADO EM 2017) DO VIETNÃ

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Abstract: Obtaining property by fraud is a crime under the Property Ownership Infringement chapter with a relatively large number of crimes occurring annually compared to other crimes in our country in recent years. In order for the process of criminal prosecution for this offender to be conducted properly, the determination of crime is an activity that is considered the beginning and has decisive significance. However, the actual crimes that occur are often very diverse. Therefore, in order to avoid mistakes and violations, the determination of crimes against this type of crime should be concerned by the proceeding agencies from the beginning and throughout the proceedings. Therefore, the authors chose to analyze the issues of determining the crime of Obtaining property by fraud in accordance with the provisions of the Criminal Code 2015 (amended and supplemented in 2017) of Vietnam.

Keywords: Crime of fraud. Penal Code (amended and supplemented in 2017). Ho Chi Minh City. Vietnam.

Resumo: A obtenção de propriedade por meio de fraude é um crime no capítulo Infração de propriedade com um número relativamente grande de crimes ocorrendo anualmente em comparação com outros crimes em nosso país nos últimos anos. Para que o processo de persecução penal desse infrator seja conduzido de forma adequada, a apuração do crime é uma atividade que é considerada início e tem significado decisivo. No entanto, os crimes reais que ocorrem costumam ser muito diversos. Portanto, a fim de evitar erros e violações, a apuração de crimes contra esse tipo de crime deve ser feita pelos órgãos processuais desde o

Received: 30 Jan 2023

Accepted: 21 Mar 2023

Published: 24 May 2023

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início e ao longo do processo. Portanto, os autores optaram por analisar as questões de determinação do crime de Obtenção de propriedade por fraude de acordo com as disposições do Código Penal de 2015 (alterado e complementado em 2017) do Vietnã.

Palavras-chave: Crime de fraude. Código Penal (alterado e complementado em 2017). Cidade de Ho Chi Minh. Vietnã.

1. Introduction

The first Criminal Code of Vietnam was born in 1985, marking a great step forward in legislative work. The Criminal Code in 1985 was issued in the context of a planned, centralized, and subsidized economy, so it has brought all the features of that period. The society have been becoming more and more developed leading to economic and social changes, the requirements of economic integration, the expansion of international relations, regardless of political regime are indispensable requirements to amend the legal system including the Criminal Code. Therefore, the Criminal Code of Vietnam has been amended and supplemented in 1989, 1991, 1992, 1997, 1999, 2009. Over the years, the Criminal Code of Vietnam has become an effective tool that can help the state managing the society, fighting against crime, protecting the regime, the state, the rights and interests of agencies, organizations and individuals and creating a great contribution to maintaining political security, social order and safety. After a period of practical application, facing with many society and economic changes, the needs for international integration so the Criminal Code of Vietnam also revealed limitations and problems because there are regulations that are no longer relevant and need to be revised. Besides that, the social relations also needed to be adjusted by criminal law to ensure the development of present and future society. Therefore, amending and supplementing the Criminal Code of Vietnam is an indispensable requirement. In 2015, the Ministry of Justice is the agency assigned by the National Assembly to assume and coordinate with relevant agencies to study and develop the Criminal Code 2015.

The Criminal Code 2015 must ensure the institutionalization of the Party's judicial reform policy and be suitable with the Constitution 2013. It also create an effective structure to protect the regime, citizens' rights, interests of the State and organizations and contribute in protecting national territorial sovereignty, security, social order and safety, promoting the development of a socialist-oriented market economy, and removing inadequacies in practical application the law to improve the effectiveness of crime prevention and meet the requirements of international integration (Loc, 2023).

The National Assembly of the Socialist Republic of Vietnam has issued Resolution No. 109/2015/QH13 dated November 27, 2015 on the implementation of the Criminal Code 2015. In the process of implementing Resolution No. 109/2015 /QH13 of the National Assembly on the implementation of the Criminal Code 2015, authorities concerned have detected and reflected technical errors, some provisions are unreasonable and difficult to apply in this Code in practice. Therefore, the National Assembly Standing Committee has directed the Judiciary Committee of the National Assembly to preside over and coordinate with the Ministry of Justice, the Ministry of Public Security, the Supreme People's Court, the Supreme People's Procuracy and other authorities concerned to conduct an overall review of the provisions of the Criminal Code 2015 to promptly correct errors and ensure uniform application of the Criminal Code 2015 in practice. On June 29, 2016, the National Assembly of the Socialist Republic of Vietnam issued Resolution No. 144/2016/QH13 on delaying the enforcement of the Criminal Code No. 100/2015/QH13, Criminal Procedure Code No. 101/2015/QH13, Law On Organization Of Criminal Investigation Bodies No. 99/2015/QH13, Law On Temporary Detention and Custody No. 94/2015/QH13 and supplement the bill amending and some articles of the Criminal Code No. 100/2015/QH13 into the law and ordinance development program in 2016.

2. Research methods

Within the scope of the article, the author uses analytical and synthesis methods, statistical methods, and combines theory with practice.

3. Research results

Within the scope of the article, the authors analyze a number of theoretical issues in determining crime and some issues to be noted when determining crimes for Obtaining property by fraud in accordance with the provisions of the Criminal Code 2015 (amended and supplemented in 2017).

Some theoretical issues when determining the crime of Obtaining property by fraud is specified

Determining crime is one of the contents of the process of applying the law and is one of the measures to bring the criminal law to life. It is the premise for the precise individualization of punishment, the basis for the application of preventive measures, the determination of the investigation, prosecution and adjudication competence of the proceeding agencies to contribute to fight against crimes, protect the law, socialist legislation, rights and interests of citizens.

Criminal determination is the identification of the appropriateness of acts that are dangerous to society and have been done with the signs of a corresponding criminal composition as defined in the criminal law. Thus, “Determining a crime is the identification and legal recognition of the exact match between the signs of a particular offense committed with the signs of the prescribed criminal composition provided in the criminal law” (Vinh, 2013,p. 4). On that basis, the crime of Obtaining property by fraud is a criminal legal assessment of the behavior of a person who intentionally commits a violation Obtaining property by fraud and determine the conformity between dangerous acts that was actually done and the provisions on Obtaining property by fraud. This is the activity of the agencies and competent persons perform in the course of conducting the proceedings for a criminal case in general and the Obtaining property by fraud case in particular. This activity is carried out by the proceeding officer at all stages of the criminal proceedings, from the initiation of the case to the cassation or retrial of the criminal case. Determining crime for Obtaining property by fraud is the main content in the application of the Criminal Code on the basis of legal signs that constitute a crime for Obtaining property by fraud. Only on the basis of the conviction, the proceeding agencies can apply the law to decide the punishment. The issue of determining the right crime at all stages of the proceedings is very important. At each stage of the proceedings, the criminal determination process is carried out by the proceedings agencies differently with different nature and characteristics. However, regardless of the stage of the proceedings, the determination of crimes also needs to go through three steps: the first step is determining the circumstances of the case; the second step is properly understanding the content of the provisions in the Criminal Code; the third step is determining the relationship between the actual signs and the signs prescribed in the law so that the basic conclusions about the consistency between the actual acts performed and the provisions of the Criminal Code about the corresponding crime will be made.

However, the above division into each step is only relative and can be done from a theoretical perspective. In fact, these steps are often performed concurrently in the cognitive activity of the proceeding officer so that it develops reflexes and skills as they deal with the case at different stages of the proceedings and can not be separated clearly and independently. However, within the scope of this article, the authors focus on the notes when determining the crime for Obtaining property by fraud through analyzing some problems of determining the crime for this type of crime in the trial stage.

Some issues need to pay attention to when determining crime for Obtaining property by fraud

In recent years, the prosecution of criminal liability for the offender of Obtaining property by fraud has been carried out quite a lot in practice. In that process, many limitations were revealed, including the inaccurate criminal determination when the criminal acts have signs of similarities with other crimes, the criminalization of civil relations, economy and civilization the offenses of Obtaining property by fraud. In order to properly assess and prosecute offenders Obtaining property by fraud, the proceeding agencies should take care to avoid these confusions.

Firstly, pay attention when determining charges for offenses that show signs of Obtaining property by fraud and other crimes, such as Abuse of trust to appropriate property. For example the following case (Senior People's Procuracy in Da Nang, 2019):

Due to an acquaintance relationship, Nguyen Van Ch went to see Ms. Hoang Thi Y to borrow 470,000,000 VND (Four hundred and seventy million VND) to do business and the loan term was one month, the interest rate is based on Bank's interest rate (Ch had a loan certificate and signed for confirmation). When the debt was due, Ch used the excuse of difficult business, so he did not have money to pay. After that, Ch continued to visit Ms. Y and gave the information that he needed money to mature, so he continued to borrow 150,000,000 VND from Ms. Y (One hundred and fifty million VND), Ch promised after the maturity date, Ch would return to Ms Y the entire amount of 620,000,000 VND (470,000,000 VND + 150,000,000 VND). Because of trusting Ch, Ms. Y continued to lend 150,000,000 VND (One hundred and fifty million VND), the interest rate agreed between the two parties according to the bank's interest rate (Ch had written a loan letter and signed for confirmation). After receiving the loan, Ch took and lent it to Ms. Nguyen Thi M. Then, Ms. Hoang Thi Y came to ask Ch to pay many times but Ch did not pay and left to Cambodia to do business without contacting Ms. Y. Therefore, Ms. Y filed a denunciation against Ch's act of Obtaining property by fraud. In the first instance criminal judgment, the Court applied Article 174 of the Criminal Code and declared Nguyen Van Ch guilty of Obtaining property by fraud. pellate criminal judgment annulled the entire first instance criminal judgment and handed over the entire case file to the Procuracy for re-investigation according to general procedures.

In this case, Nguyen Van Ch had an acquaintance with Hoang Thi Y's family, so he borrowed money many times. For each loan, Nguyen Van Ch made a loan contract with a term, the two parties agreed on the interest rate according to the bank's interest rate and signed for confirmation. When the loan contract was overdue, Ch had not paid the debt and because Ms. Y could not contact him, she filed a denunciation against Ch appropriating money from 2 loans with the amount of 620,000,000 VND. However, after that, Nguyen Van Ch and Hoang Thi Y

made a written commitment to repay the debt and determined: Nguyen Van Ch owed Hoang Thi Y 620,000,000 VND and committed to pay in installments: the first installment to pay VND 50,000,000, after 4 months to pay another 50,000,000 VND and would pay 5 - 7 million VND monthly. So, in fact, Ch had 4 times to repay Ms. Y via bank transfer with a total amount of 30,000,000 VND. Thus, the original loan contract of Nguyen Van Ch and Hoang Thi Y had been changed to another contract that the parties had agreed, completely volunteered and not against the law.

Thus, Nguyen Van Ch's performance of debt repayment obligations but not as agreed upon is a sign of Abuse of trust to appropriate property through the loan contract. However, it was necessary to investigate and verify to clarify that Nguyen Van Ch had cheated, escaped or had conditions on property to pay the debt but he did not pay. The judgment of the Court of First Instance that Nguyen Van Ch gave false information to defraud to appropriate the amount of VND 150,000,000 and sentenced Ch of Obtaining property by fraud, were not in accordance with the law.

Secondly, Obtaining property by fraud is an infringement of property, usually done through civil transactions. Therefore, it should be noted to avoid the case of criminalizing civil relations leading to criminal prosecution of innocent people.

The criminal prosecution activity of Obtaining property by fraud is an activity of the proceeding agencies, the proceeding officer conducted on the basis of collected evidences, documents and actual circumstances of the criminal case to determine the conformity between the signs of dangerous acts for society that have been performed with the signs of the corresponding criminal acts specified in Article 174 of the Criminal Code 2015 (amended and supplemented in 2017). In fact, the agency or the competent person does not always perform the above work well. There are a number of cases where the behavior is illegal, but it is only an administrative, civil or economic violation due to the errors in the process of assessing the reality of the behavior so the proceeding agency or officer has determined to be a criminal and prosecuted, investigated then tried the person who committed such law breaking act. That is the criminalization of civil and economic relations. Thus, improperly applying the law to the consequences of unfairly handling innocent people, greatly affecting the reputation of law enforcement agencies.

The conclusion and performance of civil and economic contracts give rise to the rights and obligations of the parties to the contract, which in most cases are related to the delivery, receipt and return of property to each other. The breach of the obligation to deliver, receive and return

property between the contracting parties will depend on each case such as bearing civil and economic liability, terminating the contract, paying compensation for damage, penalizing for violation the contract as agreed; in case of taking advantage of the conclusion and performance of civil and economic contracts to appropriate other people's property, the offenders must bear criminal liability. If there are deceptions to enter into to perform a contract and then appropriate another person's property, it is a violation of Obtaining property by fraud. Thus, the act with signs of Obtaining property by fraud differs from violation the contract in whether there is an act of appropriation or not. Besides, in civil transactions and in the composition of Obtaining property by fraud, there are elements of fraud and property appropriation but if only the fraud and the property appropriation factors are considered without the purpose, it will lead to the criminalization of civil and economic relations. For example the following case:

P and L - P's wife was lent 2 hectares of land by P's biological parents, Mr. S and Mrs. T, to grow cassava. Due to the lack of money to pay the debt, L leased 2 hectares of land to Mr. D with the amount of 55,000,000 VND / year for a term of 2 years. Knowing that her husband's parents did not agree, L forged the signatures of her husband and mother-in-law. Mr. D made a deposit for L 80,000,000 VND. Mr. S knew, so he prevented L from giving land to Mr. D. The investigative police agency had issued a decision to prosecute the case and accused against L for Obtaining property by fraud. However, the Procuracy issued a decision to cancel it later because L had deceptions, her purpose was renting it to Mr. D to get money to repay the debt, L's sense was still to perform the assignment of land to Mr. D. but could not perform due to Mr. S's obstruction, L did not intend to appropriate Mr. S's property. In this case, L had deceptions, but L's deception was not intended to appropriate land use rights, just only for renting. Moreover, land is real estate that in our country, people only have the right to use and is an asset that cannot be transferred when renting. Since then, the ownership of Mr. S's property had not been lost and there was no damage occurred. Therefore, L could not be prosecuted for Obtaining property by fraud.

Besides, the situation of borrowing in localities in recent times has been very common. After borrowing property without paying, there are some cases where it is difficult to distinguish the line between Obtaining property by fraud and civil transactions. Therefore, there are a number of cases that lead to the criminalization of civil relations. For example, the case: “Nguyen Thi B was prosecuted by the Procuracy for Obtaining property by fraud. In this case, B borrowed from 07 people with the amount of 2.5 billion VND and did not pay. This was a civil relationship and there was no element of fraud and appropriation, therefore, the Court had tried

the first instance and declared the defendant not guilty. After that, the Procuracy protested. The Court of Appeals of the Supreme People's Court in Ho Chi Minh City, in the appellate trial, found that the first-instance level had failed in the process of collecting evidence to determine whether the defendant had appropriated or not, so the judgment was annulled to re-investigate. During the investigation, the Investigation Agency suspended the investigation of Nguyen Thi B because the behavior did not constitute a crime. Thus, in this case, the proceeding agency had an inaccurate assessment and opinion, leading to the criminalization of civil relations for the conduct of Nguyen Thi B. (High-level People's Procuracy in Ho Chi Minh City, 2016, p.6).

Thirdly, pay attention to avoid the case of omitting the offender of Obtaining property by fraud in cases with accomplices. In some cases of Obtaining property by fraud, many people participate as accomplices, in the course of the proceedings, due to an incomplete and comprehensive assessment of the circumstances of the case, when determining the crime, the proceeding agency omitted the offender. For example the following case (Supreme People's Procuracy, 2016, p. 19):

Tran Thi H stole and brought Truong Hong Y's land use right certificate to Pham Van D's house, telling D about her intention to forge documents to transfer that land use right. D agreed to help and changed Pham Van D's certificate of singleness to Truong Hong Y. Then, H hired Duong Thi N to pretend to be Truong Hong Y and forged Y's signature to transfer Y's land use rights for K for 800 million VND. The proceeding agency only prosecuted H and N for criminal liability and did not consider D's criminal liability.

Therefore, the High People's Court in Ho Chi Minh City conducted a cassation trial to cancel the entire first-instance and appellate judgments for re-investigation. In this case, although D did not receive H's share of the appropriated money, D knew about H's criminal process and helped H commit the crime. Specifically, H told D about her intention to forge documents to transfer land use rights and asked D for help. D has agreed to help and perform the act of changing Pham Van D's certificate of singleness to Truong Hong Y's name so that H could add that certificate to Y's land use right transfer dossier. Without a certificate of singleness, H would not have been able to transfer Y's assets to appropriate money. When performing the act of correcting this document, D knew that H's purpose was to transfer Y's land use rights and appropriated property. D's behavior played the role of helping H to commit a crime. Therefore, D must be prosecuted for criminal responsibility as an accomplice. Not forcing D to be criminally responsible in this case is omitting the offender.

Fourthly, avoid the case of civilizing the offense of Obtaining property by fraud. The activity of identifying crime for the act of Obtaining property by fraud is the practice of applying criminal law as well as criminal procedure law of the proceeding agency, the proceeding officer, conducted on the basis of collected evidences, documents and actual facts of the criminal case to determine the concordance between the signs of socially dangerous acts committed with the signs of similar criminal constituencies complied with the provisions of Article 174 of the Criminal Code 2015 (amended and supplemented in 2017). When the competent agencies for some reason that refuses to carry out operations for the satisfied acts constituting the crime described in the criminal law, the crime is omitted. The practice calls this situation the civilization of Obtaining property by fraud. The content of the matter is that the proceeding agency or officer applies non-criminal law to settle disputes or violates the law that should be resolved using criminal law. This situation causes many consequences for society, the legitimate rights and interests of organizations and citizens are not protected against infringing acts. Therefore, it has been criticized by public and functional agencies in practice are also very interested and have taken many measures to overcome the crime of omission. Due to many reasons, under the influence of the market economy, the temptation of materialism, metamorphosis and abetting crimes of some officers, this case still took place and caused skepticism in public on objectivity and fairness in using of state power assigned by individuals, the proceeding agencies. For example the following case:

Pursuant to the Official Dispatch dated June 10, 2016 of the Bureau of Civil Execution proposing to prosecute the case for the crime of “Offenses against regulations on sealing, distraining property” under Article 310 of the Criminal Code 1999 (Article 385 of the Criminal Code 2015 (amended and supplemented in 2017)), the Procuracy studied the case and found that: on February 18, 2016, the Bureau of Civil Execution distrained the agricultural land with an area of 30,000 m² to ensure that Ms. Le Thi Th can fulfill her obligation to repay the amount of 486 million VND according to the civil first-instance judgment. On May 18, 2016, although the property had been distrained and in the distraint report, the Bureau of Civil Execution clearly stated that it was only assigned to Ms. Th to continue management and using and Ms. Th was prohibited transfer and donation in any form but Ms. Th still made an agreement and went to the Notary Office to sign a contract to transfer the right to use the distrained land area to Mr. Nguyen Van D for the amount of 900 million VND. After receiving the land transfer money, Le Thi Th's behavior was discovered. Considering that Le Thi Th's behavior showed signs of crime, the Procuracy transferred the Bureau of Civil Execution's petition for prosecution to the

investigating agency and requested to prosecute the case. During the investigation to clarify the progress of the case, although Ms. Th did not refund and was unable to repay Mr. D the amount of 900 million VND but the Investigation Agency still believes that, according to the provisions of the land law, the transfer of land use rights is only considered complete when the parties submit the transfer documents to the Registration Office and is approved by this agency agreed to pay the transfer tax and registration fee, so the contract dispute between Ms. Th and Mr. D is just a civil dispute, just need to guide Mr. D to file a lawsuit to ask the Court to force Ms. Th to return the money she has received, which is appropriate to make a decision and not to prosecute the criminal case. After that, the Procuracy changed opinion and issued a written reply that there was no basis to prosecute the criminal case.

In this case, when making the agreement and transferring the above land, Ms. Le Thi Th used deception by not providing Mr. D that she did not have the right to transfer the right to use the land. Ms. Th intentionally concealed information about the land distrained by the Bureau of Civil Execution so that Mr. D could trust her and sign the contract and give money so that Ms. Th appropriated money and was not able to return the money received. The fact that, Ms. Th's sale of assets assigned for management after being distrained is a typical act of Offenses against regulations on sealing, distraining property specified in Article 310 of the Criminal Code 1999. At the time of signing the transfer contract, the crime has been completed whether the sale (transfer of land use rights) is considered complete in accordance with the law of the land. In addition, Ms. Th's acts of intentionally using deceptions to sign illegal contracts and appropriate other people's property have infringed on two objects protected by the Criminal Law. That is the legal order in the distraint of assets of competent authorities and ownership relations; the purpose of the distraint violation is appropriating Mr. D's property so the acts of distraint can be considered as a precondition for the offender to perform the next act to achieve the set purpose. According to the principle of attraction of crime, Le Thi Th's behavior has signs of constituting Obtaining property by fraud under the provisions of Article 139 of the Criminal Code 1999 (Article 174 of the Criminal Code (amended and supplemented) year 2017)). Therefore, the proceeding agency concluded that Ms. Th's behavior did not commit any crime and the case needs to be resolved in accordance with the civil law, is omitting the crime and also known as the civilization of the violation of Crime Obtaining property by fraud.

4. Conclusion

Obtaining property by fraud is a crime that has occurred in relatively large numbers in our country in recent years. Criminal acts are relatively complex and diverse with increasingly sophisticated tricks. This makes the determination of crimes for this type of crime in fact may have some mistakes and violations. Therefore, considering and evaluating fully, comprehensively and properly the evidences and documents as well as understanding the provisions of the criminal law on this type of crime to make a correct assessment and compliance with the law are very important when determining the crime of Obtaining property by fraud.

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